United States Court of Appeals

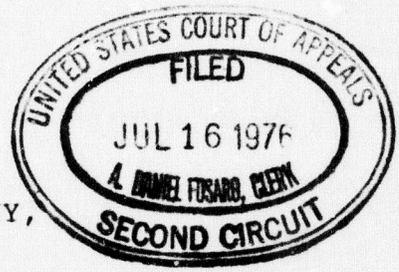
for the Second Circuit

APPELLANT'S BRIEF

76-7222

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



In the Matter of

GRAND BAHAMA PETROLEUM COMPANY, LIMITED,

Petitioner-Appellee,

-against-

ASIATIC PETROLEUM CORPORATION,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT ASIATIC PETROLEUM CORPORATION

CRAVATH, SWAINE & MOORE
Attorneys for Respondent-Appellant
Asiatic Petroleum Corporation
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

John R. Hupper
Anthony A. Dean
Peter E. Calamari

Thomas R. McDade
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

John M. Rochford, Secretary
Asiatic Petroleum Corporation
One Rockefeller Plaza
New York, New York 10020

Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7222

In the Matter of

GRAND BAHAMA PETROLEUM COMPANY, LIMITED,

Petitioner-Appellee,

-against-

ASIATIC PETROLEUM CORPORATION,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT ASIATIC PETROLEUM CORPORATION

Preliminary Statement

Respondent-Appellant Asiatic Petroleum Corporation ("Asiatic"), appeals to this Court from an opinion and order of the United States District Court for the Southern District of New York (App. 188a)* certifying the question set forth below for appeal pursuant to 28 U.S.C. § 1292(b). Asiatic applied to this Court for permission to appeal and on April 29, 1976, that application was granted (App. 191a).

---

* The citation "App." followed by a page number refers to the joint appendix on this appeal.

Question Presented

May an action to compel arbitration pursuant to the Federal Arbitration Act (9 U.S.C. § 4) be maintained in a United States District Court sitting in New York by a non-qualified foreign corporation doing business in New York, where the District Court's jurisdiction is founded solely upon an alleged diversity of citizenship and where the strong public policy of New York State, as embodied in its Business Corporation Law (§ 1312), prohibits the maintenance of such an action in the New York State courts?

Statement of the Case

The dispute between the parties herein arose when petitioner-appellee Grand Bahama Petroleum Company Limited ("Grand Bahama"), a foreign corporation not qualified to do business in New York State, withheld payment for three separate shipments of oil to it from Asiatic (App. 95a, ¶ 6). These shipments were made pursuant to an interim agreement entered into between the parties and reduced to writing on April 28, 1975 (App. 73a), as a result of an arbitration then pending between the parties.

In an effort to collect the money owed to it, Asiatic commenced a lawsuit against Grand Bahama in the United States States District Court for the Southern District of Texas

(App. 92a). Grand Bahama then commenced this action in the Southern District of New York, contending that the Texas action should be stayed and the parties compelled to arbitrate their dispute pursuant to the Federal Arbitration Act, 9 U.S.C. § 4 (App. 11a, ¶ 24).

The Federal Arbitration Act does not itself confer a basis for Federal jurisdiction. The Act provides that, before any action can be commenced under it, an independent basis for Federal jurisdiction must be alleged, 9 U.S.C. § 4. To satisfy this requirement, Grand Bahama founded jurisdiction on an alleged diversity of citizenship between it and Asiatic pursuant to 28 U.S.C. § 1332(a) (App. 3a, ¶ 3).

In an effort to explore Grand Bahama's right to maintain this action, Asiatic sought limited discovery on the question of whether or not Grand Bahama was "doing business" in New York within the meaning of the New York State Business Corporation Law ("BCL"), § 1312 (McKinney's, 1963).* This statute precludes the maintenance of an action in New York by a foreign corporation doing business in New York which has not qualified to do business (and thus, among other things,

---

* Asiatic also sought to determine whether or not Grand Bahama's principal place of business was New York. Since Asiatic's principal place of business is concededly New York, a finding that Grand Bahama's principal place of business is also New York would, of course, destroy diversity.

is not paying New York State franchise taxes).*

Grand Bahama, however, moved to quash Asiatic's notice to take depositions on the ground that BCL § 1312 is irrelevant to actions commenced under the Federal Arbitration Act. Asiatic contended that if the doors to the New York State Courts are closed to Grand Bahama, it should not be permitted to walk across the street and obtain relief in the Federal Court simply because of the accident of diversity of citizenship.

The District Court, by an opinion and order dated March 11, 1976, granted Grand Bahama's motion, precluding further discovery on the question of Grand Bahama's presence in New York (App. 180a). The Court stated that since there is a body of Federal substantive law under the Federal Arbitration Act, § 1312 of the BCL is inapplicable even in a diversity case (App. 182a).

Asiatic moved for reconsideration of that motion

---

* BCL § 1312 provides in part:

"(a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation."

and, in the alternative, for certification pursuant to 28 U.S.C. § 1292(b). In its opinion and order dated March 29, 1976 (App. 188a), the District Court granted reconsideration, but reaffirmed its prior ruling. The Court, however, granted § 1292(b) certification. Asiatic then applied to this Court for permission to appeal and on April 29, 1976, that application was granted (App. 191a).

ARGUMENT

POINT I

GRAND BAHAMA, IN ITS PRESENT POSTURE, CANNOT MAINTAIN THIS ACTION IN THE NEW YORK STATE COURTS.

A. BCL § 1312 Closes the Doors to the New York State Courts to Grand Bahama.

At the outset, it should be emphasized that for purposes of this appeal, it must be assumed that Grand Bahama is doing business in New York within the meaning of B.C.L. § 1312, since the District Court cut off discovery and made no factual determination on the issue.* The only question

---

* Indeed, it is undisputable that Grand Bahama has substantial contacts with New York State. It is owned by a company whose principal office is in New York and the interim agreement at issue here was negotiated and entered into in New York during an arbitration proceeding in New York (App. 73a). In addition, that arbitration involved a contract which was negotiated in New York (App. 172a) and founded upon a memorandum agreement which was entered into in New York (App. 174a). Asiatic contends that if discovery is allowed to continue, the facts adduced would establish beyond peradventure that Grand Bahama is doing business in New York.

presented here is whether that fact is a legal impediment to the maintenance of this action by Grand Bahama.

BCL § 1312 provides that a nonqualified foreign corporation "doing business" in New York may not maintain any action or special proceeding* unless and until such corporation has qualified to do business in the State. The decision whether to qualify is left to the offending foreign corporation; the consequences of nonqualification are clear.

In Dixie Dinettes, Inc. v. Schaller's Furniture, Inc., 335 N.Y.S.2d 632 (Civ. Ct. Kings County 1972), a foreign corporation brought an action to recover upon a series of sales made to defendant. Defendant admitted the sales, but contended that the plaintiff could not maintain the action because it had failed to comply with BCL § 1312. After a trial without a jury, the court concluded that plaintiff was not licensed to do business in New York. The court

---

* In the District Court and in its answer to Asiatic's § 1292(b) application, Grand Bahama unsuccessfully argued that BCL § 1312 does not apply to "special proceedings", citing such cases as Matter of Terminal Auxiliar Maritima, 11 Misc. 2d 697, 178 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1957), and Matter of Tugee Laces, Inc., 297 N.Y. 914, 79 N.E.2d 744 (1948). These cases, however, turned on the distinction between an action and a special proceeding, see Maritima at 698, Tugee Laces at 916. The predecessor to BCL § 1312 applied only to "actions". As was pointed out by the District Court in rejecting Grand Bahama's argument (App. 181a), this distinction was abolished by the amendments to BCL § 1312 which now specifically includes within its prohibition "any action or special proceeding" (emphasis supplied); see also New York C.P.L.R. § 103.

cogently expressed the strong public policy behind BCL § 1312 when it noted:

> " . . . [O]nce a corporation is found to be doing business in this State it must comply with Section 1312(a). The purpose of this requirement is to protect domestic corporations from unfair competition and to place them on an equal footing with corporations who are using the facilities provided by the State of New York in the conduct of their business. (citations omitted)
>
> "The Legislature has penalized non-compliance by foreign corporations by denying them recourse to the courts of this State to enforce their rights or redress their grievances. In a word, these corporations have no standing to sue until they have complied with these regulations." (emphasis supplied) 335 N.Y.S.2d at 635.*

The court went on to dismiss the action without prejudice, advising plaintiff that it could renew the action by complying with BCL § 1312.

Similarly in William L. Bonnell Co. v. Katz, 23 Misc. 2d 1028, 1031, 196 N.Y.S.2d 763, 768 (Sup. Ct. N.Y. County 1960) it was stated: "Fairness and justice require that when a foreign corporation comes into our State to conduct business . . . such a corporation should be subject to our laws and regulations as a recompense for the advantages enjoyed by it."

---

* BCL § 1312 is additionally important in the collection of state and federal taxes, identifying foreign corporations operating within the state, and in the protection of New York citizens by insuring ready susceptibility of the corporation to service of process. The statute also provides an important informational service by making available details of the foreign corporation's financing and control to New York citizens with whom it deals.

It is clear from the above decisions that a non-qualified foreign corporation doing business in New York is given the choice of seeking qualification or having any actions it wishes to maintain dismissed.* See, e.g., Conklin Limestone Co. v. Linden, 22 App. Div. 2d 63, 253 N.Y.S.2d 578 (3d Dep't 1964); State by Lefkowitz v. ITM, Inc., 275 N.Y.S.2d 303 (Sup. Ct., N.Y. County 1966); Plasticrete Corp. v. Guy H. Nuovo Corp., 59 Misc. 2d 1097, 301 N.Y.S.2d 272 (Dist. Ct. 2d Dist., Nassau County 1969).

Grand Bahama has deliberately chosen not to qualify and since it must be assumed that Grand Bahama is doing business in New York within the meaning of BCL § 1312, there can be no doubt that a New York State court would prevent Grand Bahama from maintaining this action, see, e.g., Marion Laboratories, Inc. v. Wolins Pharmacal Corp., 28 N.Y.2d 884, 271 N.E.2d 554 (1971); Talbot Mills, Inc. v. Benegra, 35 Misc. 2d 924, 231 N.Y.S.2d 229 (Sup. Ct., N.Y. County 1962).

B. It is Constitutional for New York to Close its Doors to Grand Bahama.

---

* This matter of choice was pointed out at Appendix 1 to the Business Corporation Law by George D. Hornstein, Professor of Law, New York University School of Law, as follows:

> "A contract made in New York by a non-qualifying corporation is to be unenforceable until the corporation qualifies [under § 1312]."

Grand Bahama argued below that it would be unconstitutional for New York State to apply BCL § 1312 to any action on a contract which involves transactions in foreign commerce, citing Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974). Allenberg is inapposite and in fact supports the opposite view. While the court in Allenberg held that it was unconstitutional for the State of Mississippi to refuse to enforce a contract involving interstate commerce, it did so only because the foreign corporation did not have sufficient intrastate contracts to justify a requirement that it qualify to do business in the State of Mississippi. Thus, the Supreme Court stated:

> "In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a state seeks to require a foreign corporation to qualify to do business." 419 U.S. at 33.

Here, it must be assumed for purposes of this appeal that Grand Bahama's contacts within the State of New York are more than sufficient to justify application of BCL § 1312 (see footnote p. 5, supra).

Under such circumstances door closing legislation of the type involved has long been considered a constitutional exercise of the powers of the State government even in the face of challenges under the Commerce Clause of the U.S. Constitution (Article 1, § 8, cl. 3). See, e.g.,

Eli Lilly & Co. v. Save-On-Drugs, Inc., 366 U.S. 276 (1961); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); Railway Express Co. v. Virginia, 282 U.S. 440 (1931); Scanipico v. Richmond, F.M.P.R.R. 439 F.2d 17 (2d Cir. 1970); Sar Mfg. Co., Inc. v. Dumas Bros. Mfg. Co., Inc., 526 F.2d 1283 (5th Cir. 1976); see also Anglo American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

Where a state law does not substantially interfere with or burden the Federal government, the state may enforce its laws even though such laws may have some effect on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Union Brokerage Co. v. Jensen, supra, stated the general rule that "[i]n the absence of applicable federal regulation, a State may impose non-discriminatory regulations on those engaged in foreign commerce 'for the purpose of insuring the public safety and convenience'." Id. at 211-12 (citation omitted).*

---

* See also Varsity House, Inc. v. Varsity House, Inc., 377 F. Supp. 1386 (E.D.N.Y. 1974), in which the court said:

> "The interstate commerce aspect of defendant's operation does not prevent the enforcement against it of nondiscriminatory state laws. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 94 S. Ct. 383, 396, 38 L.Ed. 2d 348 (1973)." 377 F. Supp. at 1388.

Here Asiatic contends and for purposes of this appeal, it must be assumed, that Grand Bahama is engaged in extensive intrastate business in New York. The New York Statute has legitimate purposes and is clearly nondiscriminatory. It follows, therefore, that the application of BCL § 1312 to require Grand Bahama to qualify to do business in New York as a condition precedent to maintaining this action does not violate the Commerce Clause of the Federal Constitution.

POINT II

THE ERIE DOCTRINE REQUIRES THE FEDERAL COURTS TO GIVE EFFECT TO THE STATE COURT'S DOOR CLOSING POLICY IN DIVERSITY CASES.

It is undisputed that Federal district courts do not and cannot have jurisdiction under the Federal Arbitration Act, unless there exists an independent basis of Federal jurisdiction. 9 U.S.C. § 4, Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F.2d 382 (2d Cir.), cert. denied, 368 U.S. 817 (1961); Litton RCS, Inc. v. Pennsylvania Turnpike Commission, 376 F. Supp. 579 (E.D. Pa. 1974), aff'd, 511 F.2d 1394 (3d Cir. 1975). Here Grand Bahama has attempted to satisfy that requirement by asserting that jurisdiction is founded upon an alleged "diversity of citizenship" (App. 16a).

The nature and function of a federal court which

entertains a diversity case is very different from that of a federal court in which jurisdiction is obtained because of the existence of a federal question.* Most importantly, "[] for purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State. . . .'" Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Angel v. Bullington, 330 U.S. 183, 187 (1947); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108 (1945).

The United States Supreme Court has squarely held that in a federal diversity case, state law determines whether a party may maintain its action in federal court Swanson v. Traer, 354 U.S. 114, 116 (1957).**

These principles are especially applicable in situations involving state requirements for qualification of foreign corporations. Thus, in Woods v. Interstate Realty Co., supra, a Tennessee corporation, brought suit against a resident of Mississippi, alleging diversity of citizenship as the basis for federal jurisdiction. The

---

* Grand Bahama has not predicated jurisdiction in this action upon a federal question and indeed it cannot do so.

** In R. V. McGinnis Theatres & Pay T.V., Inc. v. Video Independent Theatres, 386 F.2d 592 (10th Cir. 1967), cert. denied, 390 U.S. 1014 (1968), even though the action was based on federal causes of action, the court held that plaintiff lacked capacity to sue because of provisions of state law. See also Brody v. Chemical Bank, 482 F.2d 1111, 1114 (2nd Cir. 1973).

District Court dismissed the complaint since plaintiff was doing business in Mississippi without qualifying under a Mississippi statute similar to BCL § 1312. The Fifth Circuit reversed (relying on David Lupton's Sons Co. v. Automobile Club, 225 U.S. 489 (1911)), and concluding that the fact that plaintiff could not sue in the Mississippi state courts did not close the doors to the federal court sitting in that state. The Supreme Court, citing its landmark decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), reversed the Fifth Circuit and overruled Lupton's. The Court held that in a diversity case, the federal court may not entertain an action to which the state court had closed its doors. The Court stated:

> ". . . [F]or purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State'." 337 U.S. at 538.

Further, the court said:

> ". . . [A] right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate." (emphasis supplied) 337 U.S. at 538.

Thus, in Woods, it was held that in diversity

cases, the defense of failure of a foreign corporation to qualify under state law is available in federal courts just as in state courts and constitutes valid ground for dismissal of the action. See also Advance Industrial Security, Inc. v. William J. Burns International Agency, Inc., 377 F.2d 236, 239 (5th Cir. 1967).

District courts have uniformly followed the Woods holding. Thus, in Stafford-Higgins Industries, Inc. v. Gaytone Fabrics, Inc., 300 F. Supp. 65 (S.D.N.Y. 1969), Judge Weinfeld squarely held that BCL § 1312 applies to an action brought in federal court where jurisdiction was founded upon diversity.*

In Edmiston v. Time, Inc., 257 F. Supp. 22 (S.D.N.Y. 1966), the court upheld the applicability of a New York "door-closing" statute prohibiting certain actions from being brought in the state courts (and hence the federal courts) of that state: "Such a door-closing policy can and should be bind-

---

* In his written opinion, Judge Weinfeld said:

> "Since jurisdiction rests upon diversity, the question presented is to be determined under state law [citing Woods v. Interstate Realty]. Under New York law, a foreign corporation 'doing business' within the state is barred from maintaining any action until it qualified and pays required fees and taxes." 300 F. Supp. at 66.

ing upon a federal court sitting within the state." Id. at 24. Likewise in Display Stage Lighting Co. v. Century Lighting, Inc., 41 F. Supp. 937, 938 (S.D.N.Y. 1941), the court held that " . . . the capacity of the plaintiff to sue must be determined by the law of New York."

Properly understood, therefore, the substantive law of the forum state in a diversity action actually "limits the subject-matter jurisdiction of the court". Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 815 n. 4 (2d Cir.), cert. denied, 396 U.S. 840 (1969).* The object is to ensure that the accident of diversity does not alter the outcome of litigation.

The Supreme Court stated the proposition succinctly in Guaranty Trust Co. of New York v. York, supra, a diversity action, when it said

> "The outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." 326 U.S. at 109.

---

* Thus, in Farrell this Court held that the jurisdiction of a federal diversity court was limited by a portion of the New York BCL which provided that foreign corporations may sue other foreign corporations only under certain specified conditions. The Court pointed out that as applied even to federal courts, the New York statute constituted "a reasonable limitation on access to the courts." 411 F.2d at 815 n.4.

POINT III

FEDERAL COURTS SHOULD GIVE EFFECT TO STATE DOOR CLOSING POLICIES IN DIVERSITY CASES EVEN UNDER THE FEDERAL ARBITRATION ACT.

In this case the District Court found that even though this is a diversity case, it could disregard the prohibitions of BCL § 1312 since "there is a body of federal substantive law which governs the case. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409 (2d Cir. 1959), cert. denied, 364 U.S. 801 (1960); Lawn v. Franklin, 328 F. Supp. 791 (S.D.N.Y. 1971)." (App. 182a). We agree with the District Court when it stated that it believed "the issue to be one of first impression", id. However, for the reasons set forth herein, we submit that District Court erred in its conclusion.

Asiatic does not dispute that there is a body of Federal substantive law which governs questions concerning the merits of litigation under the Federal Arbitration Act (e.g., the existence of a contract to arbitrate, its validity, etc.) for cases involving maritime contracts or contracts "involving commerce". Robert Lawrence Co., supra;*

---

* In El Hoss Eng. & Transp. Co., Ltd. v. American Independent Oil Company, 289 F.2d 346 (2d Cir.), cert. denied, 368 U.S. 837 (1961), this Court summarized its holding in the Robert Lawrence case saying:

see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

Indeed, this substantive law is equally applicable in either state or federal courts. See, e.g., In re A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co., 25 N.Y.2d 576, 255 N.E.2d 774 (1970). Thus, where the requisite diversity is lacking, an action may be commenced in a state court and, when the requisite commerce elements are present, those courts are required to apply and enforce the federal law, id. In short, both the federal and state courts seek to prevent the accident of diversity from altering the outcome of a lawsuit under the Federal Arbitration Act, Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1955).

The question, however, is not whether federal or state law applies to the underlying dispute (as was the case in Prima Paint and Rederi, supra), but rather whether the federal court may even entertain a diversity action where the state court would prohibit it. The existence of federal substantive rights clearly has not abrogated the requirement of an independent basis of jurisdiction in the federal courts

---

"Robert Lawrence . . . holds that the validity and interpretation of an arbitration agreement must be determined by the federal substantive law of arbitration as expressed in the Arbitration Act." (emphasis supplied) 289 F.2d at 347.

for actions under the Federal Arbitration Act.*

Indeed, Congress explicitly provided in 9 U.S.C. § 4 that the rights conferred by that section cannot be exercised unless there exists an independent jurisdictional ground. Presumably, Congress could have created a new jurisdictional basis as it did, for example, in passing the Lanham Act, 15 U.S.C. § 1051 et seq. By relying upon diversity of citizenship, however, as the most common ground for bringing an action under 9 U.S.C. § 4, Congress made manifest its intent that state law shall govern those aspects of an arbitration action (such as capacity to sue) which are not specifically spelled out to the contrary in the Act itself.**

---

* Hot Roll Mfg. v. Cerone Equip. Co., 38 App. Div. 2d 339, 329 N.Y.S.2d 466 (3rd Dep't 1972), cited by the Court below, is inapposite. That case did not address the question whether the federal Court must respect BCL § 1312. Nor did the case involve the Federal Arbitration Act. It merely holds that an action maintained in violation of BCL § 1312 puts in issue the capacity of the plaintiff to bring the suit, but does not affect the state court's subject matter jurisdiction.

** In Litton RCS, Inc. v. Pennsylvania Turnpike Comm., supra, a case brought pursuant to the Federal Arbitration Act, the court held that a provision of state law providing that an arbitrator's award could be confirmed only in a certain state court afforded a defense cognizable in a federal court in a diversity action. The court held further that "[i]t is only when state law contravenes the express provisions of the . . . Arbitration Act that state law must fall." Id. at 590. Since the Act is silent regarding its availability to an unregistered foreign corporation, certainly there is no conflict between the act and the public policy and law of the State of New York; hence, the state law must prevail.

We submit that absent such a conflict, the state public policy must be respected and the federal court should refuse to entertain the action. Perhaps recognizing this, Grand Bahama has argued that BCL § 1312 is in conflict with Rule 17 of the Federal Rules of Civil Procedure. This argument is totally without merit. As demonstrated above, federal courts have uniformly applied statutes similar to BCL § 1312 in diversity cases, see, e.g., Woods v. Interstate Realty Co., Stafford-Higgins Industries, Inc. v. Gaytone Fabrics, Inc., supra. Professor Moore explained the application of Rule 17(b) to diversity cases well when he stated:

> "While technically the corporation may have capacity to sue in the federal court pursuant to Rule 17(b) it cannot recover where recovery would not be possible in the state court. Any valid state law closing its courts to a foreign corporation which is not qualified to do business in the state, must, therefore, be given effect in the federal courts of such state in a case based solely on diversity or alienage jurisdiction. To this extent Rule 17(b) has been qualified." 3A Moore's Federal Practice ¶ 17.21 at 773-4 (2d ed. 1974); see also Marine Midland Bank v. Ayer, F. Supp. (75 Civ. 3318, S.D.N.Y. Feb. 13, 1976); Weinstock v. Sinatra, 379 F. Supp. 274, 276-7 (C.D. Cal. 1974).

Conclusion

There can be no question that, if Grand Bahama is doing business in New York, then New York State courts would not permit this action and there also can be no question that

New York State would be constitutionally entitled to refuse to entertain the action (see Point I supra). Since the state court would dismiss the action, then if the federal court is allowed to entertain the action, diametrically opposite results will be obtained merely because of the fortuitous accident of diversity. This should not be permitted. To conclude otherwise suggests that in promulgating the Federal Arbitration Act, Congress intended to create opportunities for profuse forum shopping of the sort which Erie sought to eliminate.

For the foregoing reasons the order appealed from should be reversed and Asiatic should be awarded its costs and disbursements of this appeal.

July 14, 1976

Respectfully submitted,

CRAVATH, SWAINE & MOORE,
Attorneys for Respondent-Appellant,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000

John R. Hupper
Anthony A. Dean
Peter E. Calamari

Thomas R. McDade
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

John M. Rochford, Secretary
Asiatic Petroleum Corporation
One Rockefeller Plaza
New York, N. Y. 10020

Of Counsel.